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No. 99793-4

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IN THE SUPREME COURT OF THE STATE OF  
WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

TYLER BAGBY,

Petitioner.

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BRIEF OF AMICUS CURIAE FRED T. KOREMATSU  
CENTER FOR LAW AND EQUALITY  
IN SUPPORT OF PETITIONER

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Jessica Levin, WSBA #40837

Robert S. Chang, WSBA #44083

Melissa R. Lee, WSBA #38808

RONALD A. PETERSON LAW CLINIC

SEATTLE UNIVERSITY SCHOOL OF LAW

1112 East Columbia St.

Seattle, WA 98122

Tel: (206) 398-4167

[levinje@seattleu.edu](mailto:levinje@seattleu.edu) | [changro@seattleu.edu](mailto:changro@seattleu.edu) | [leeme@seattleu.edu](mailto:leeme@seattleu.edu)

Counsel for Amicus Curiae

FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY

## TABLE OF CONTENTS

Table of Authorities .....	ii
Identity and Interest of Amicus Curiae .....	1
Introduction .....	1
Argument.....	4
I.    Courts Should Pay Close Attention to Racially Coded Language that May Appear Race-Neutral But that Animates Racial Prejudice .....	4
II.   The Objective Observer Standard Provides a Principled and Consistent Approach to Account for How Racism Operates in Subtle and Unintentional Ways in a Criminal Proceeding .....	11
III.  Presuming Prejudice Recognizes the Impossibility of Determining Whether a Guilty Verdict Would Have Been Reached Absent an Improper Appeal to Race .....	19
A.   This Court Has Already Determined that Errors Affecting the Fundamental Fairness of Trial Are Presumptively Prejudicial on Appeal.....	20
B.   Race-Based Prosecutorial Misconduct Should Also Be Considered Presumptively Prejudicial.....	23
Conclusion.....	29

## TABLE OF AUTHORITIES

### WASHINGTON CASES

<i>In re Pers. Restraint of Coggin</i> , 182 Wn.2d 115, 340 P.3d 810 (2014) .....	21
<i>State v. Avendano-Lopez</i> , 79 Wn. App. 706, 904 P.2d 324 (1995) .....	8
<i>State v. Belgarde</i> , 110 Wn.2d 504, 755 P.2d 174 (1988) .....	8
<i>State v. Berhe</i> , 193 Wn.2d 647, 444 P.3d 1172 (2019) ..	2, 13, 14, 24, 25, 27
<i>State v. Brown</i> , 147 Wn.2d 330, 58 P.3d 889 (2002) .....	23
<i>State v. Case</i> , 49 Wn.2d 66, 298 P.2d 500 (1956) .....	28
<i>State v. DeLeon</i> , 185 Wn. App. 171, 341 P.3d 315 (2014) .....	27
<i>State v. Gregory</i> , 192 Wn.2d 1, 427 P.3d 621 (2018) .....	2
<i>State v. Irizarry</i> , 111 Wn.2d 591, 763 P.2d 432 (1988) .....	22
<i>State v. Jefferson</i> , 192 Wn.2d 225, 429 P.3d 467 (2018) .....	2, 13, 14
<i>State v. Monday</i> , 171 Wn.2d 667, 257 P.3d 551 (2011) .....	<i>passim</i>
<i>State v. Pelkey</i> , 109 Wn.2d 484, 745 P.2d 854 (1987) .....	21

<i>State v. Perez-Mejia</i> , 134 Wn. App. 907, 143 P.3d 838 (2006) .....	8
<i>State v. Saintcalle</i> , 178 Wn.2d 34, 309 P.3d 326 (2013) .....	4, 14, 15, 27, 28
<i>State v. Swan</i> , 114 Wn.2d 613, 790 P.2d 610 (1990) .....	17
<i>State v. Torres</i> , 16 Wn. App. 254, 554 P.2d 1069 (1976) .....	7, 8
<i>State v. Vreen</i> , 143 Wn.2d 923, 26 P.3d 236 (2001), <i>abrogated by</i> <i>Rivera v. Illinois</i> , 556 U.S. 148, 129 S. Ct. 1446, 173 L. Ed. 2d 320 (2009) .....	22, 23
<i>State v. Warren</i> , 165 Wn.2d 17, 195 P.3d 940 (2008) .....	12
<i>State v. Wise</i> , 176 Wn.2d 1, 288 P.3d 1113 (2012) .....	20, 21
<i>State v. Zamora</i> , No. 99959-7 .....	2

#### OTHER STATE AND FEDERAL CASES

<i>Arizona v. Fulminante</i> , 499 U.S. 279, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991) .....	20, 21
<i>Batson v. Kentucky</i> , 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986) .....	28
<i>Neder v. United States</i> , 527 U.S. 1, 119 S. Ct. 1827, 144 L.Ed.2d 35 (1999) .....	23

<i>Rose v. Clark</i> , 478 U.S. 570, 106 S. Ct. 3101, 92 L.Ed.2d 460 (1986) .....	20
<i>Weddington v. State</i> , 545 A.2d 607 (Del. 1988) .....	24

## CONSTITUTIONAL PROVISIONS

Const. art. I, § 22 .....	24
---------------------------	----

## RULES

GR 37.....	2, 12, 14, 16
GR 37(f).....	13, 14

## OTHER AUTHORITIES

John A. Bargh et al., <i>Automaticity of Social Behavior: Direct Effects of Trait Construct and Stereotype Activation on Action</i> , 71 J. Personality & Soc. Psychol. 230 (1996) .....	6
André Douglas Pond Cummings, <i>Racial Coding and the Financial Market Crisis</i> , 2011 Utah L. Rev. 141 (2011) .....	5
Elizabeth L. Earle, <i>Banishing the Thirteenth Juror: An Approach to the Identification of Prosecutorial Racism</i> , 92 Colum. L. Rev. 1212 (1992) .....	4
Theodore Eisenberg & Sheri Lynn Johnson, <i>Implicit Racial Attitudes of Death Penalty Lawyers</i> , 53 DePaul L. Rev. 1539 (2004) .....	17

Ian Haney-López, <i>Dog Whistle Politics: How Coded Racial Appeals Have Reinvented Racism and Wrecked the Middle Class</i> (2014) .....	5
Jerry Kang et. al., <i>Implicit Bias in the Courtroom</i> , 59 UCLA L. Rev. 1124 (2012) .....	4, 6, 10
Justin D. Levinson & Danielle Young, <i>Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence</i> , 112 W. Va. L. Rev. 307 (2010).....	6
Tasnim Motala, <i>Words Still Wound: IIED &amp; Evolving Attitudes Towards Racist Speech</i> , 56 Harv. Civil Rights-Civil Liberties L. Rev. 115 (2020) .....	25, 26
Praatika Prasad, <i>Implicit Racial Biases in Prosecutorial Summations: Proposing an Integrated Response</i> , 86 Fordham L. Rev. 3091 (2018).....	5, 6, 7
Research Working Group, Task Force on Race and the Criminal Justice System, <i>Preliminary Report on Race and Washington’s Criminal Justice System</i> , 35 Seattle U. L. Rev. 623 (2012); 87 Wash. L. Rev. 1 (2012); 47 Gonz. L. Rev. 251 (2012) .....	27
L. Song Richardson & Phillip Goff, <i>Implicit Racial Bias in Public Defender Triage</i> , 122 Yale L.J. 2626 (2013) ....	17, 18
Cheryl Staats, Kirwan Inst. for the Study of Race & Ethnicity, <i>State of the Science: Implicit Bias Review</i> (2013) .....	10
Mikah K. Thompson, <i>Bias on Trial: Toward an Open Discussion of Racial Stereotypes in the Courtroom</i> , 2018 Mich. St. L. Rev. 1243 (2018) .....	7

## **IDENTITY AND INTEREST OF AMICUS CURIAE**

The identity and interest of amicus are set forth in the Motion for Leave to File, submitted contemporaneously with this brief.

## **INTRODUCTION**

The improper injection of race into a criminal proceeding is antithetical to a defendant's right to a fair trial and is corrosive to public confidence in our justice system. When a prosecutor's comments, whether intentional or careless, activate racial bias, a defendant's right to a fair trial is compromised. The current standard for prosecutorial misconduct in this context, similar to what it used to be for peremptory challenges, requires in essence a conclusion by courts that the prosecutor engaged in intentionally racist conduct. This intent standard, as it did when it applied to peremptory challenges, purports to address racism but in practice operates to reinforce and reinscribe the operation of racial bias.

In this case and in *State v. Zamora*, No. 99959-7, this Court has the opportunity to adopt two new rules that would safeguard a defendant's right to a fair trial in the face of race-based prosecutorial misconduct. First, it should adopt and adapt the objective observer standard as the metric for defining whether misconduct occurred, as it has in the contexts of both peremptory challenges<sup>1</sup> and race-based juror misconduct.<sup>2</sup> This standard will aid courts in assessing whether the effect of the prosecutor's comments improperly injected race into the proceedings, while simultaneously obviating the need for a court to label the prosecutor as possessing racist intent. To combat racism, we cannot continue to narrowly focus on the intent of criminal justice system actors—we need to examine the real-world effects. *Cf. State v. Gregory*, 192 Wn.2d 1, 427 P.3d 621 (2018).

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<sup>1</sup> GR 37; *State v. Jefferson*, 192 Wn.2d 225, 249, 429 P.3d 467 (2018) (constitutionalizing standard in GR 37).

<sup>2</sup> *State v. Berhe*, 193 Wn.2d 647, 657, 444 P.3d 1172 (2019).

Second, this Court should decline to apply constitutional harmless error in cases where an objective observer could view the prosecutor's comments as improperly introducing race into the proceedings. Race-based prosecutorial misconduct must be considered presumptively prejudicial, as suggested in the concurrence in *State v. Monday*, 171 Wn.2d 667, 682, 257 P.3d 551 (2011) (Madsen, C.J., concurring, joined by Fairhurst, J., and Stephens, J.). When a prosecutor's comments improperly racialize a case, the effects are impossible to quantify and affect the fundamental fairness of the trial, unlike other trial-type errors that can be assessed within the context of other evidence. Further, the current rule, which allows courts to find improper race-based prosecutorial misconduct but provide no relief, embraces the false notion of "no harm, no foul." Race-based prosecutorial misconduct is a foul that harms litigants and erodes public confidence in our justice system.

## ARGUMENT

### I. Courts Should Pay Close Attention to Racially Coded Language that May Appear Race-Neutral But that Animates Racial Prejudice.

Today, society has mostly replaced explicit forms of racism with “newer, more elusive, but equally injurious form[s] of derision.” Elizabeth L. Earle, *Banishing the Thirteenth Juror: An Approach to the Identification of Prosecutorial Racism*, 92 Colum. L. Rev. 1212, 1222-23 (1992); *State v. Saintcalle*, 178 Wn.2d 34, 46, 309 P.3d 326 (2013) (“[W]e all live our lives with stereotypes that are ingrained and often unconscious, implicit biases that endure despite our best efforts to eliminate them.”). These implicit biases are “attitudes and stereotypes that are not consciously accessible through introspection.” Jerry Kang et. al., *Implicit Bias in the Courtroom*, 59 UCLA L. Rev. 1124, 1129 (2012).

Implicit biases may be activated through the use of racial code words or coded language, which involves using phrases or symbols that “play upon ... white Americans’ negative views of

black [sic] Americans – without explicitly raising the race card.” André Douglas Pond Cummings, *Racial Coding and the Financial Market Crisis*, 2011 Utah L. Rev. 141, 217 (2011).

Coded language is a “form of racism that stimulate[s] the intended audience without overtly transgressing prescribed social limits.” Ian Haney-López, *Dog Whistle Politics: How Coded Racial Appeals Have Reinvented Racism and Wrecked the Middle Class*, 16-17 (2014). The speaker who employs racial code words will deny any racist intent: “[coded language] trades... in studied ambiguity, where the lack of a smoking-gun racial epithet allows for proclamation of innocence.” *Id.* at 130.

When prosecutors present references to racially coded language, jurors respond with their own “latent biases.” Praatika Prasad, *Implicit Racial Biases in Prosecutorial Summations: Proposing an Integrated Response*, 86 Fordham L. Rev. 3091, 3101 (2018). Although “jurors may be more ‘careful and thoughtful’ about their opinions” when a prosecutor makes explicit references to race, jurors are not

usually as careful when a prosecutor makes an implicit racial reference or a racially coded reference. Kang et al., *supra*, at 1143-44. Using coded language “primes” jurors, “incidental[ly] activat[ing] [] knowledge structures, such as trait concepts and stereotypes by the current situational context.” John A. Bargh et al., *Automaticity of Social Behavior: Direct Effects of Trait Construct and Stereotype Activation on Action*, 71 J. Personality & Soc. Psychol. 230, 230 (1996). Once a prosecutor primes jurors with coded language, “it affects the way they make decisions in racially stereotyped ways.” Justin D. Levinson & Danielle Young, *Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence*, 112 W. Va. L. Rev. 307, 326-27 (2010). Coded language often involves the theme or euphemisms that invoke a conception of us versus them. Prasad, *supra*, at 3104-09.

Prosecutors’ use of racially coded language to refer to Black defendants suggests they are an “out-group” and alludes to the idea that they come from “different worlds” than white

jurors. *Id.* at 3107-08. When prosecutors use terms like “‘them,’ ‘these people,’ and ‘not like us’” they “highlight differences between the jurors and Black defendants,” *id.*, and show that Black defendants are “inherently different” from white jurors. Mikah K. Thompson, *Bias on Trial: Toward an Open Discussion of Racial Stereotypes in the Courtroom*, 2018 Mich. St. L. Rev. 1243, 1257 (2018). When prosecutors foster conceptions of an “in-group” versus an “out-group,” white jurors may be less inclined to think Black defendants deserve sympathy and may not properly weigh the evidence, Prasad, *supra*, at 3107-08, preventing a defendant from being “judged by an impartial jury,” *id.* at 3101.

Washington courts have already functionally acknowledged examples of coded language and their pernicious effects, even though the courts did not explicitly label the misconduct as improper use of code words. In *State v. Torres*, 16 Wn. App. 254, 255, 554 P.2d 1069 (1976), the court, utilizing a proto-codeword analysis, recognized that even subtle

invocations of a defendant's ethnic and national background might affect juror decision-making. *Id.* at 257 (effect of continuous reference to defendants as Mexicans or Mexican-Americans during opening statement, while possibly inadvertent, "may have been to impugn the standing of the defendants ... and intimate that the defendants would be more likely than those of other races to commit the crime charged"). That racial factor, the court wrote, ought to be weighed in evaluating whether a trial was "permeated with prejudice from its inception." *Id.* at 258.<sup>3</sup>

*State v. Monday* serves as one of this Court's first explicit

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<sup>3</sup> See also *State v. Belgarde*, 110 Wn.2d 504, 507, 755 P.2d 174 (1988) (prosecutor's characterization of American Indian Movement, to which the defendant belonged, as a group of "butchers and madmen" was a "deliberate appeal to the jury's...prejudice"); *State v. Avendano-Lopez*, 79 Wn. App. 706, 718, 904 P.2d 324 (1995) (situation in which the prosecutor asked the defendant "You are not legal in this country, are you?" was grossly improper); *State v. Perez-Mejia*, 134 Wn. App. 907, 918, 143 P.3d 838 (2006) (prosecutor's referencing Latino defendant's *machismo* was "designed to call attention to the defendant's ethnicity" and was "unquestionably improper.").

recognitions of implicit bias, as well as the role that racial codewords can play in criminal trials. 171 Wn.2d at 667. During Mr. Monday's murder trial, the prosecutor appeared to mock a Black witness's way of speaking by pronouncing "police" as "po-leese." *Id.* at 672-73. Throughout the trial, multiple eyewitnesses either changed or recanted their prior statements identifying Mr. Monday as the perpetrator; at closing argument, the State chalked up the recantations to what he labeled an antisnitch code:

[T]he only thing that can explain to you the reasons why witness after witness ... flat out denies what cannot be denied ... is the code. And the code is black folk don't testify against black folk. You don't snitch to the police.

*Id.* at 671, 674. His invocation of an alleged antisnitch code, along with his pronunciation of police as "po-leese," was to "subtly, and likely deliberately, call to the jury's attention that the witness was African American and to emphasize the prosecutor's contention that "black folk don't testify against black folk." *Id.* at 679.

This Court’s analysis in *Monday* hews closely to understandings about racial biases in juries derived from empirical sociological research. *See* Cheryl Staats, Kirwan Inst. for the Study of Race & Ethnicity, *State of the Science: Implicit Bias Review*, 6 (2013). Cognitive theory has shown that latent racial biases require a stimulus to produce a motivating response in the audience. Even the simplest racial cues can automatically and irrevocably affect how jurors evaluate the evidence presented to them—precisely what the *Monday* Court recognized. 171 Wn.2d at 678; *see also* Kang, et al., *supra*, at 1144 (“[T]he subtle manipulation of skin color alter[s] how jurors evaluated the evidence presented and also how they answered the crucial question ‘How guilty is the defendant?’”).

To more effectively deter the use of racially coded language and other subtle appeals that activate racial bias, this Court should use the objective observer standard to determine whether race-based prosecutorial misconduct occurred.

II. The Objective Observer Standard Provides a Principled and Consistent Approach to Account for How Racism Operates in Subtle and Unintentional Ways in a Criminal Proceeding.

This Court's work to deter prosecutorial misconduct is unfinished. *See Monday*, 171 Wn.2d at 680. To ensure the fair treatment of criminal defendants and restore public confidence in the criminal justice system, the rules for defining misconduct must remedy the effect of prosecutorial misconduct that inflames racial bias, including priming and use of code words, regardless of intent.

*Monday* did not resolve the question of whether intent is required when defining misconduct, stating only that misconduct occurs when a prosecutor has "flagrantly or *apparently* intentionally appeal[ed] to racial bias." *Id.* (emphasis added). The conduct in both this case and in *Zamora* demonstrates the "flagrantly or apparently intentionally"

standard in *Monday* does not do enough to deter use of more subtle forms of bias.<sup>4</sup>

A principled and consistent approach can be found in the objective observer standard, which this Court has already adopted to address other race-based misconduct during criminal proceedings. In 2018, this Court adopted GR 37, creating the objective observer standard to address both difficult-to-prove explicit bias and operation of implicit bias in jury selection. An objective observer is “aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors in

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<sup>4</sup> Mr. Bagby has argued that the prosecutor’s comments constitute flagrant and ill-intentioned misconduct, Supp. Br. of Pet’r at 13-26, which is the standard for any claim of prosecutorial misconduct raised on appeal that has not been preserved by an objection at trial. *State v. Warren*, 165 Wn.2d 17, 43, 195 P.3d 940 (2008). However, race-based prosecutorial misconduct, after *Monday*, appears to be controlled by the “flagrantly or apparently intentionally” standard adopted in that case, as defense counsel did not object, and the Court declined to apply the flagrant and ill-intentioned standard. *Monday*, 171 Wn.2d at 680.

Washington State.” GR 37(f). Later that year, it constitutionalized this rule in *Jefferson*, 192 Wn.2d at 249. The following year, this Court adopted the objective observer standard to address race-based juror misconduct in *Berhe*, 193 Wn.2d at 665, as this standard more robustly protects a defendant’s right to an impartial jury.

These changes reflect that this Court is not powerless when faced with racism in the criminal justice system and can craft new approaches that provide meaningful relief. As this Court noted in *Berhe*, “as our understanding and recognition of implicit bias evolves, our procedures for addressing it must evolve as well,” *id.* at 663, including that it need “not ‘throw up our hands in despair at what appears to be an intractable problem,’” *id.* at 664. These examples show that this Court has not just thrown up its hands in despair. Instead, it has consistently implemented the objective observer standard to address the reality that “racial bias is a common and pervasive evil that causes systemic harm to the administration of justice.”

*Id.* at 657; *see also id.* at 663 (recognizing that because “implicit racial bias can be particularly difficult to identify and address,” previous approaches were insufficient).

This Court should extend the objective observer test to address prosecutorial misconduct. Applied to this context, the standard would ask whether an objective observer, one “who is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have influenced jury verdicts in Washington State,”<sup>5</sup> could view the prosecutor’s comments as improperly introducing race into the proceedings. Employing the perspective of the objective observer removes the focus from the prosecutor’s intent.<sup>6</sup> Instead, it examines

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<sup>5</sup> *Berhe*, 193 Wn.2d at 665 (adapting GR 37(f) to juror misconduct).

<sup>6</sup> As this Court has recognized in the context of peremptory challenges, a finding of intent (or even apparent intent) does not account for the problem of unconscious racism, *Saintcalle*, 178 Wn.2d at 53, and “requires judges to accuse attorneys of deceit and racism,” *id.* As the Court called for in *Saintcalle* and achieved with GR 37 and *Jefferson*, the objective observer

whether the comments themselves could be viewed as improperly influencing the jury's deliberative process, including how the jury may view both the defendant and the evidence through a racialized lens.

Further, employing the objective observer standard in defining misconduct would assist trial courts and reviewing courts in determining whether misconduct occurred. This standard would allow trial courts to identify race-based prosecutorial misconduct *sua sponte*, and to have an effective analytical framework if defense counsel objects. Either scenario would empower trial courts to assess the impact and effect of the comments, rather than be constrained to assessing intent (or apparent intent), and then waiting for an appeal to determine whether the case must be tried again. Empowering trial courts to dismiss a venire and call a new one, or to declare a mistrial

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standard gives trial courts the “necessary latitude to weed out unconscious bias where it exists, without fear of reversal and without the need to level harsh accusations against attorneys or parties.” *Saintcalle*, 178 Wn.2d at 54.

and retry the case, champions judicial efficiency. As with GR 37, litigation of “close calls” will be necessary—but this is precisely what the objective observer standard allows. As actors in the system recalibrate and adjust to the new standard, we build a fairer system.

The standard would also allow appellate courts to meaningfully engage with the actual effects of the prosecutor’s comments, rather than having to conduct a separate analysis based on whether an objection preserved the error.<sup>7</sup> Vindication of fair trial rights should not be dependent upon whether defense counsel objected—particularly when the empirical

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<sup>7</sup> If the error is preserved by an objection, a reviewing court looks at the effects of a prosecutor’s conduct (although not through the lens of the objective observer) by examining that conduct in the full trial context, including the evidence presented, the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.” *Monday*, 171 Wn.2d at 675 (internal citations omitted). If defense counsel does not object, reversal is not required “unless the conduct is so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury.” *Id.* at 679 (internal citations omitted).

literature demonstrates that operation of implicit bias may be invisible even to defense counsel.<sup>8</sup> See, e.g., Theodore Eisenberg & Sheri Lynn Johnson, *Implicit Racial Attitudes of Death Penalty Lawyers*, 53 DePaul L. Rev. 1539, 1556 (2004) (“Like the rest of the population, race influences their [capital defense lawyers] automatic reactions.”); L. Song Richardson & Phillip Goff, *Implicit Racial Bias in Public Defender Triage*, 122 Yale L.J. 2626, 2631 (2013) (“There is ample concern that [implicit biases] will affect public defenders’ judgments because [implicit biases] thrive in situations where individuals make decisions quickly with imperfect information, and when they are cognitively depleted, anxious, or distracted.”). Implicit biases can affect defense counsel’s evaluation of ambiguous

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<sup>8</sup> Two decades before this Court recognized the operation of implicit bias in *Saintcalle*, it assumed that “a defendant’s failure to object to a prosecutor’s remarks when they are made strongly suggests that the remark did not appear critically prejudicial in the trial’s context.” *State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990) (internal citations omitted). The empirical literature demonstrates this proposition is deeply flawed.

evidence, their perception of their client's credibility, and overall trial strategy. Richardson & Goff, *supra*, at 2631. Further, the presence or absence of an objection does not change a reviewing court's ability to engage with the record and determine whether an objective observer could view the prosecutor's comments as improperly introducing race into the proceedings.

The objective observer standard also empowers trial courts and appellate courts alike to engage more directly in assessing the pernicious ways that subtle appeals to race may improperly influence a jury. Focusing on whether the conduct improperly affected the outcome, rather than on whether the prosecutor intended to infuse race into the trial, comes closer to addressing how racism actually operates and allows courts to account for instances in which harmful effects occur—even if the misconduct was truly inadvertent. This undoubtedly will amount to a significant shift, where the benefit of the doubt will go to the defendant rather than the State. But these types of

significant shifts are necessary to disrupt the ways that our legal rules, including appellate standards, have permitted rather than redressed improper appeals to race.

III. Presuming Prejudice Recognizes the Impossibility of Determining Whether a Guilty Verdict Would Have Been Reached Absent an Improper Appeal to Race.

In addition to adopting the objective observer standard, this Court should adopt the per se prejudice rule suggested in the *Monday* concurrence. 171 Wn.2d at 682 (Madsen, C.J., concurring, joined by Fairhurst, J., and Stephens, J.). As the *Monday* concurrence recognized, “the injection of insidious discrimination into this case is so repugnant to the core principles of integrity and justness upon which a fundamentally fair criminal justice system must rest that only a new trial will remove its taint.” *Id.* Facially neutral gatekeeping tests like harmless error need to be scrutinized to ensure that they do not perpetuate the prior product of racial bias. Too often, wrongful conduct has been allowed by applying prejudice rules—but the “no harm, no foul” approach ignores the harm to the very fabric

of our justice system that results when prosecutorial misconduct is tolerated. Application of per se prejudice will help to ensure that our criminal proceedings are more fair.

A. This Court Has Already Determined that Errors Affecting the Fundamental Fairness of Trial Are Presumptively Prejudicial on Appeal.

Application of per se prejudice is consistent with Washington courts' recognition of class of errors that, while not rising to the level of structural error, is presumptively prejudicial on direct appeal. Between structural errors<sup>9</sup> that are, by definition, not subject to harmless error analysis,<sup>10</sup> and "trial

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<sup>9</sup> A structural error is "a special category of constitutional error that 'affect[s] the framework within which the trial proceeds, rather than simply an error in the trial process itself.'" *State v. Wise*, 176 Wn.2d 1, 13, 288 P.3d 1113 (2012) (quoting *Arizona v. Fulminante*, 499 U.S. 279, 310, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991)).

<sup>10</sup> Structural errors necessitate reversal because the error is a breakdown of the adversarial process, and those errors are, by definition, incompatible with harmless error analysis. *See Rose v. Clark*, 478 U.S. 570, 577-78, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986) ("Without these basic protections, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, ... and no criminal punishment may be regarded as fundamentally fair.").

type” constitutional errors that can be subjected to harmless error analysis,<sup>11</sup> is a category of errors that are presumptively prejudicial on direct appeal. These errors are considered presumptively prejudicial because the errors undermine the fundamental fairness of the trial itself, and because it is impossible to quantify the effect of the errors on the verdict.

Eschewing the blanket applicability of harmless error, Washington courts have held that some constitutional errors necessitate a per se prejudice standard, particularly when the error substantially undermines the fundamental fairness guaranteed in our judicial system. *See, e.g., State v. Pelkey*, 109 Wn.2d 484, 490-91, 745 P.2d 854 (1987) (finding midtrial amendment of information is a per se violation that necessarily

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<sup>11</sup> A “trial error” subject to harmless error review occurs during the “presentation of the case to the jury” and can be “quantitatively assessed in the context of other evidence presented [] to determine whether its admission was harmless beyond a reasonable doubt.” *In re Pers. Restraint of Coggin*, 182 Wn.2d 115, 130, 340 P.3d 810 (2014) (quoting *Fulminante*, 499 U.S. at 307-08).

prejudiced defendant's right to be informed of the nature of the charges against him under article I, section 22, and defendant was "highly vulnerable to the possibility that jurors will be confused or prejudiced"); *State v. Irizarry*, 111 Wn.2d 591, 592, 763 P.2d 432 (1988) (mandating reversal because "it is fundamental that under our state constitution [article I, section 22] an accused person must be informed of the criminal charge he or she is to meet at trial, and cannot be tried for an offense not charged").

Although later abrogated, this Court's decision in *State v. Vreen* illustrates the challenge in applying harmless error analysis where the impact of the error on the deliberative process cannot be quantified. *State v. Vreen*, 143 Wn.2d 923, 930-32, 26 P.3d 236 (2001) (erroneously allowing a juror to sit despite an attempted peremptory challenge amounted to reversible error without a showing of prejudice because it would be impossible for a reviewing court to determine the degree of resulting harm), *abrogated by Rivera v. Illinois*, 556

U.S. 148, 129 S. Ct. 1446, 173 L. Ed. 2d 320 (2009) (denial of a defendant's peremptory challenge to prospective juror did not amount to a structural error). In contrast, other trial errors can be quantitatively assessed in the context of other evidence. *See e.g., State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (determining a trial error harmless when a misstated or a missing element in a jury instruction was supported by uncontroverted evidence) (citing *Neder v. United States*, 527 U.S. 1, 4, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)).

B. Race-Based Prosecutorial Misconduct Should Also Be Considered Presumptively Prejudicial.

Due to the similarities between an appeal to racial bias by a prosecutor—an error that affects the fundamental fairness of trial and is impossible to quantify—and other errors that are presumptively prejudicial on direct appeal, race-based prosecutorial misconduct should be treated as per se prejudicial.

A trial tainted with race-based prosecutorial misconduct is a constitutional error that renders a trial fundamentally unfair.

“[T]he right to a fair trial that is free of improper racial implications is so basic to the federal Constitution that *an infringement upon that right can never be treated as harmless error.*” *Monday*, 171 Wn.2d at 683 (Madsen, C.J., concurring) (quoting *Weddington v. State*, 545 A.2d 607, 613-15 (Del. 1988) (emphasis added)); *see also id.* at 682 (only a new trial will remove the taint of race-based prosecutorial misconduct).

Subjecting race-based prosecutorial misconduct to harmless error ignores how racism fundamentally undermines the right to a fair trial under article I, section 22. Every defendant is guaranteed the right to an impartial jury. Const. art. I, § 22. “An impartial jury means an unbiased and unprejudiced jury.” *Berhe*, 193 Wn.2d at 658 (internal quotations and citations omitted). Thus, a defendant is deprived of the constitutional right to a fair trial by an impartial jury “when explicit or implicit racial bias is a factor in a jury’s verdict.” *Id.* at 657. Race-based prosecutorial misconduct prevents the jury from doing its job.

Subjecting race-based prosecutorial misconduct to harmless error also ignores how racism operates. Application of harmless error suggests that the pervasive nature of bias can somehow be measured in assessing whether the jury would have still rendered a verdict of guilty. Rampant racial prejudice is hard to measure in the way other trial-type errors subject to constitutional harmless error can be measured. *See, e.g., id.* at 664 (“[A] person may honestly believe and credibly testify that his or her actions were not influenced by racial bias, even where implicit racial bias did in fact play a significant role.”).

Further, subjecting race-based prosecutorial misconduct to harmless error ignores the harm caused to participants. Race-based prosecutorial misconduct causes irreparable harm to those in the criminal justice system and the judiciary at large because it is “steeped in a legacy of oppression, harmful stereotypes, and otherization.” Tasnim Motala, *Words Still Wound: IIED & Evolving Attitudes Towards Racist Speech*, 56 Harv. Civil Rights-Civil Liberties L. Rev. 115, 119 (2020); *see*

*Monday*, 171 Wn.2d at 694 n.5 (“When the government resorts to appeals to racial bias to achieve its ends, all of society suffers, including victims.”).

Research reveals racial trauma that is “present and prevalent among groups that have experienced and continue to experience racism in its many forms.” *Motala, supra*, at 119; *see also id.* (“The harms of racial trauma are only compounded by the lack of meaningful remedy....”). Psychiatrists and psychologists increasingly recognize the unique physical, emotional, and mental harms of racism—noting that “these harms can stem from systemic institutionalized racism, as well as discrete incidents of racism.” *Id.* Thus, race-based prosecutorial misconduct negatively impacts everyone in the court system and likely causes irreparable physical, emotional, and mental harm. *See id.* at n.44 (“[R]acial stigma deprives individuals of the confidence that they are being dealt with in good faith, leaving them (quite understandably) somewhat mistrustful of even those individuals [or institutions] who

expressly claim and perhaps even believe that they are nonracist.”).

Finally, subjecting race-based prosecutorial misconduct to harmless error undermines the integrity of our justice system. *Berhe*, 193 Wn.2d at 657 (“racial bias is a common and pervasive evil that causes systemic harm to the administration of justice.”). In particular, many people of color do not trust the court system to resolve their disputes or administer justice even-handedly because “bias pervades the entire legal system in general.” *Saintcalle*, 178 Wn.2d at n.1 (quoting Research Working Group, Task Force on Race and the Criminal Justice System, *Preliminary Report on Race and Washington’s Criminal Justice System*, 35 Seattle U. L. Rev. 623, 635 (2012); 87 Wash. L. Rev. 1, 12 (2012); 47 Gonz. L. Rev. 251, 262 (2012); *see also State v. DeLeon*, 185 Wn. App. 171, 221, 341 P.3d 315 (2014) (Knodell, J., concurring) (“The judicial system, like all government institutions in a democracy, *can be effective only when it enjoys the confidence and trust of the people.*”

(emphasis added)). Because prosecutors represent all the people of Washington and have a duty “to act impartially in the interest only of justice,” *State v. Case*, 49 Wn.2d 66, 70, 298 P.2d 500 (1956), when prosecutors use racial appeals during a trial proceeding, they fail to uphold their duty.

The integrity of the justice system, and by extension the public’s trust in the fairness of the system, requires an effective response to instances of race-based prosecutorial misconduct. *See Saintcalle*, 178 Wn.2d at 41-42 (“[R]acial discrimination ‘undermines public confidence in the fairness of our system of justice.’” (quoting *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986))). Although this Court’s racial bias jurisprudence is evolving to better respond to and redress race discrimination, more needs to be done. Ultimately, maintaining harmless error instead of adopting a per se rule means that some appeals to racial prejudice will be permitted. In addition to sending the wrong message to defendants and to the public, it may fail to adequately curb prosecutorial misconduct. Race-

based prosecutorial misconduct is a form of racism. No form of racism should ever be rationalized as harmless.

## **CONCLUSION**

Amicus urges this Court to adopt the objective observer standard to determine whether a prosecutor has committed misconduct by improper injection of racial considerations into criminal justice proceedings. In addition, amicus urges the Court to go further than the constitutional harmless error rule and to instead adopt a per se prejudice rule.

## **RAP 18.17 Certification**

Undersigned counsel certifies that, pursuant to RAP 18.17(b), this brief contains 4,828 words, exclusive of words contained in the appendices, title sheet, table of contents, table of authorities, certificates of compliance and signature blocks, and pictorial images, and therefore meets the word count limitation of 5,000 words for amicus briefs as required by RAP 18.17(c)(6).

DATED this 9th day of February, 2022.

Respectfully Submitted:

/s/ Jessica Levin

Jessica Levin, WSBA #40837

Robert S. Chang, WSBA #44083

Melissa R. Lee, WSBA #38808

Counsel\* for Amicus Curiae

FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY

\*Counsel recognize Civil Rights Clinic students

Devin Epp, '22, Megan Fore, '22, Margaret Hannon, '22, and  
Dontay Proctor-Mills '22, for their significant contributions to  
this brief

## **DECLARATION OF SERVICE**

I declare under penalty of perjury under the laws of the State of Washington, that on February 9, 2022, the forgoing document was electronically filed with the Washington State's Appellate Court Portal, which will send notification of such filing to all attorneys of record.

Signed in Seattle, Washington, this 9th day of February, 2022.

/s/ Jessica Levin

Jessica Levin

Counsel for Amicus Curiae

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Sender Name: Jessica Levin - Email: levinje@seattleu.edu  
Address:  
901 12TH AVE  
KOREMATSU CENTER FOR LAW & EQUALITY  
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